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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

JAMES ROBERT BARKACS, Petitioner,	07cv2139 JAH (WMc)
v.	**ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**
D. ADAMS, Warden, Respondent.	**28 U.S.C. § 2254**

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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

JAMES ROBERT BARKACS, Petitioner, v. **D. ADAMS, Warden,** Respondent.	07cv2139 JAH (WMc) **ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** **28 U.S.C. § 2254**

RESPONDENT, D. Adams, Warden, by and through counsel, Edmund G. Brown Jr., Attorney General for the State of California, and Douglas P. Danzig, Deputy Attorney General, files this Answer to Petition For Writ of Habeas Corpus Under 28 U.S.C. § 2254 By A Person In State Custody (Petition), pursuant to an Order issued by this Court. Respondent hereby asserts:

I.

Petitioner is lawfully in Respondent's custody following his conviction in San Diego County Superior Court case number SCE234361, of one count of murder, one count of carjacking, one count of arson, and a true finding on a special circumstance allegation that the murder occurred during a carjacking.

II.

The cause of Petitioner's custody is an indeterminate prison term of life without the possibility of parole plus three years.

III.

The Petition is timely.

IV.

The claims raised in the Petition are exhausted.

V.

The Anti-Terrorism and Effective Death Penalty Act of 1996 governs this case.

VI.

Petitioner is not entitled to federal habeas corpus relief on grounds one, two, or three, because the state court determinations of the merits of the claims were consistent with controlling precedent and reasonable.

VII.

Petitioner is not entitled to an evidentiary hearing to resolve his claims because his claims are based on facts developed in state court proceedings.

VIII.

The Memorandum of Points and Authorities in support of the Answer is hereby incorporated by reference.

IX.

Except as herein expressly admitted, Respondent denies each contention and allegation in the Petition, denies Petitioner's confinement is in any way illegal, and denies that any of Petitioner's constitutional rights have been, or are being, violated in any way.

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Wherefore, Respondent respectfully requests that the Petition for Writ of Habeas Corpus be denied with prejudice, that any request for an evidentiary hearing be denied, and that any request for a certificate of appealability be denied.

Dated: May 6, 2008

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

PROCEDURAL BACKGROUND

On February 22, 2005, in San Diego County case number SCE234361, a jury convicted Barkacs of one count of murder with a special circumstance allegation that the murder occurred during a carjacking (Cal. Penal Code §§ 187, 190.2(a)(17)), one count of carjacking (Cal. Penal Code § 215(a)), and one count of arson (Cal. Penal Code § 451(d)). (Lodgement 1 (Clerk's Transcript from Petitioner's direct appeal in state court) (CT), at 160-62.) On April 6, 2005, the court sentenced Barkacs to prison for a term of life without the possibility of parole plus a consecutive three years on the carjacking count. (CT at 120-23, 163.)

Barkacs appealed the judgment, California Court of Appeal case number D046201. In an unpublished opinion filed November 30, 2006, the Court of Appeal affirmed the judgment in all respects. (Lodgment 2.)

On January 10, 2007, Barkacs filed a Petition For Review with the California Supreme Court, case number S149361, seeking discretionary review of the Court of Appeal's opinion. (Lodgement 3.) On March 14, 2007, the California Supreme Court denied the Petition For Review, without comment or citation. (Lodgement 4.)

On November 7, 2007, Barkacs filed the Petition that is currently pending in this case. In an Order filed November 15, 2007, this Court ordered Respondent to file a response to the Petition.

II.

FACTUAL BACKGROUND[1/]

A. *The People's Evidence*

1. *The Events Leading Up To The Murder*

On October 2, 2003, at approximately 10:30 p.m., Barkacs, his girlfriend, Linda Lott,

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1. The "Factual Background" is taken verbatim from the opinion in Petitioner's direct appeal in state court. (Lodgment 2.)

and his friend, Calvin Pete, picked up Pete's girlfriend, Kristina Paine, from Grossmont College. Pete was driving Paine's car. After taking Paine to her apartment, Pete asked Paine if he and Barkacs could use Paine's car to drive around and watch Lott work as a prostitute. Paine refused to allow the group to borrow her car. Lott then fixed her hair and makeup and changed her clothes. Paine observed that it appeared Lott was preparing to go to work as a prostitute.

The group went outside the apartment and Lott started to walk away. Pete followed Lott, while Barkacs stayed near the apartment with Paine. Paine went inside the apartment and shortly thereafter, heard her car alarm sounding. She went outside the apartment and saw Barkacs sitting in the driver's seat of her car. Paine told Barkacs to come inside the apartment. Barkacs got out of the car and went into the apartment. Approximately 45 minutes after the group had arrived at Paine's apartment, Pete returned to the apartment. Pete and Barkacs then went out to look for Lott.

Pete told Barkacs that he had seen Lott get into a stranger's pickup truck. Barkacs responded by saying that that [sic] he “had to” find Lott. Barkacs punched a street sign in anger. He appeared to be “worried and frustrated.” Barkacs told Pete, “If I get a car, just leave.” Pete saw Barkacs get inside a Trans Am that was parked nearby and attempt to start the car. Apparently unable to start the car, Barkacs got out of the Trans Am.

2. *The Murder*

A short time later, Pete saw Barkacs get into a car that was parked in the driveway of a motel. As Barkacs began to drive the car away, the murder victim, Pablo Cruz, ran after the car. Cruz jumped on the car and hung onto the driver's side of the car. The car swerved to the left and then to the right, with Cruz hanging onto the car. Cruz ultimately fell to the ground. After Cruz fell, Barkacs drove off.

Vu Tu, the night clerk at the motel at which Cruz's car had been parked, testified that Cruz parked his car outside the office of the motel and ran into the office. Cruz told Vu that he lived at the motel and that he needed to park his car at the motel for two days. Before Vu could respond, he saw that a man had gotten into Cruz's car and started to drive off. Cruz chased after the car and jumped onto the roof of the car. Tu testified that the driver "zigzagged" across the street and Cruz fell off the car. Cruz hit his head on the pavement when he fell. Vu called 911.

Another witness, Bobby Daniel, also saw Cruz jump onto a car as it left the motel parking lot. The driver "was trying to rock the car, and it rocked [Cruz] off."

3. *Events After The Murder*

After the incident, Pete returned to Paine's apartment and called Barkacs's father, William Barkacs (William). Shortly thereafter, Barkacs telephoned Pete at Paine's apartment, from the motel where William lived. Pete then went to see Barkacs.

Firefighters discovered Cruz's car, on fire, at 3:18 a.m. on the morning of October 3, approximately eight blocks from William's motel. Fire investigator Russell Steppe determined that the fire had been deliberately set. He believed that the fire had probably been started by an open flame that ignited a flammable material.

4. *Cruz's Medical Treatment And His Death*

Paramedics transported Cruz to the hospital. Trauma surgeon Dr. Frank Kennedy evaluated Cruz. Dr. Kennedy noted that Cruz was unresponsive and that he had a laceration to the head. Dr. Kennedy inserted a breathing tube and ordered a CT-scan. The CT-Scan revealed a skull fracture and an epidural bleed between Cruz's skull and his brain, which was compressing the brain. Cruz underwent emergency neurosurgery to relieve pressure on the brain.

Over the next week, doctors used a series of medications in an attempt to stabilize the pressure on Cruz's brain. However, despite their efforts, the pressure continued to increase. In addition, Cruz's blood pressure began to drop, and he suffered a lung infection. Dr. Kennedy testified that at the end of the week following the incident, Cruz's chances of survival were "very low." During the entire course of his hospitalization, Cruz had required mechanical ventilation in order to breathe.

On October 9, Dr. Kennedy determined that Cruz's prognosis was "very, very grim." Dr. Kennedy met with Cruz's family and discussed the medical facts of Cruz's condition.

After this discussion, Cruz's family requested that doctors cease providing aggressive care to Cruz. At approximately 1:00 p.m. that day, doctors disconnected the breathing machine and discontinued all medications they had been administering in an attempt to elevate Cruz's blood pressure. Cruz was given 10 milligrams of morphine to alleviate any discomfort. He died at 2:04 p.m. that same day.

Dr. Christina Stanley conducted an autopsy on Cruz on October 10, 2003. Dr. Stanley testified that Cruz had suffered "a severe blunt impact to his head that was severe enough to create fractures that [went] across not only the top but the base of the skull." Cruz also suffered injuries to his brain, hemorrhage in his brain stem, and diffused swelling in the head. Dr. Stanley determined that the cause of death was blunt force head injuries.

B. *The Defense Evidence*

The defense called William as a witness. The trial court informed the jury that it had deemed William unavailable as a witness, and that his preliminary hearing testimony would be read to the jury.[FN2] At the preliminary hearing, William testified that Barkacs, Lott, and Pete were in his motel room after the incident involving Cruz's car. When asked whether Barkacs was "under the influence of anything," William responded, "heavily." According to William, Barkacs told William that he had taken a car, but also said that he did not really remember the chain of events.

FN2. During a hearing outside the presence of the jury, William invoked his Fifth Amendment right not to incriminate himself, and the court declared him unavailable as a witness.

Lott testified that Barkacs had taken a number of prescription medications on the night of the incident, including "somas, and valiums, and lorcets, xanax." Barkacs appeared to be under the influence of drugs when he arrived at William's motel room after the incident. Pete also came to William's motel room. When Pete and Barkacs left the motel, Lott believed they were going to burn Cruz's car. Lott stated that Pete spoke with her the next day regarding burning Cruz's car. Lott testified that Pete told her that he had to "burn the car because [Barkacs] was too messed up."

Dr. Harry Bonnell, a forensic pathologist and former chief deputy medical examiner for the County of San Diego, testified as an expert witness for the defense regarding Cruz's medical treatment and the cause of his death. Dr. Bonnell stated that Cruz's medical records indicated that Cruz had been admitted to the hospital with a fractured skull, bleeding inside the skull, and damage to the brain. Cruz's injuries required emergency neurosurgery. Dr. Bonnell classified the surgery as successful in that it had stopped the bleeding, and Cruz survived the operation. The surgery "certainly saved [Cruz's] life...."

Dr. Bonnell noted that Cruz had initially been given one to five milligrams of morphine per hour. This amount was increased to eight to nine milligrams per hour for several days, and was then tapered back down to three or four milligrams per hour. Beginning at 12:00 a.m. on the morning of October 8, Cruz received no morphine for 36 or 37 hours. However, just before the respirator was turned off on October 9, at 12:45 p.m., Cruz was given 10 milligrams of morphine. Cruz was given another 10 milligrams of morphine at 2:00 p.m.

Dr. Bonnell explained that morphine depresses respiratory activity. When asked if there was terminology for the treatment Cruz received, Bonnell testified, "Some people would call it euthanasia." Dr. Bonnell testified that he did not believe euthanasia was legal in California. He classified the cause of Cruz's death as "acute-respiratory depression due to acute morphine toxicity due to blunt impact to the head."

(Lodgment 2 at 2-7.)

III.

THE STANDARD OF REVIEW

In cases subject to the AEDPA, a petitioner may not receive relief with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim was either "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or was based on "an unreasonable determination" of the state court evidence. 28 U.S.C. § 2254(d).

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The "contrary to" and "unreasonable application" clauses contained in 28 U.S.C. § 2254(d) have distinct meanings. *Williams v. Taylor*, 529 U.S. 362, 404 (2000). A decision is "contrary to" United States Supreme Court authority if it fails to apply the correct controlling authority, or if it applies the controlling authority to a case involving facts materially indistinguishable from those in a controlling case, but reaches a different result. *Williams v. Taylor*, 529 U.S. at 413-14. A decision is an "unreasonable application" of clearly established federal law if the state court identifies the correct governing legal principle but unreasonably applies that principle to the facts of that case. *Id.* at 413. The "unreasonable application" clause requires the state court decision to be more than incorrect or erroneous; in order for a federal court to grant a habeas writ, the state court decision must be objectively unreasonable. *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003) (citing *Williams v. Taylor*, 529 U.S. at 409-410, 412).

When a state court does not find a constitutional violation, a federal court may still grant relief if the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Under the AEDPA, a state court's factual findings are entitled to a presumption of correctness. Therefore, a petitioner must prove the state court's factual findings erroneous by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *see also Taylor v. Maddox,* 366 F.3d 992, 999 (9th Cir.2004). Mixed questions of fact and law are reviewed under the "contrary to" and "unreasonable application" clauses in 28 U.S.C. § 2254(d)(1). *Lambert v. Blodgett*, 393 F.3d 943, 976 (9th Cir. 2004). A state court's factual findings underlying its conclusion on mixed issues are accorded a presumption of correctness. *Id.*

IV.

GROUND ONE SHOULD BE DENIED BECAUSE THE STATE COURT'S MERITS DETERMINATION WAS CONSISTENT WITH CONTROLLING PRECEDENT AND REASONABLE

In ground one, Barkacs claims the trial court violated his rights to due process when it denied his request to instruct the jury pursuant to his requested instructions regarding causation and independent intervening acts. (Petition at 6.)

///

A. Background

The trial court stated its intention to instruct the jury with CALJIC Nos. 3.40[2/] and 3.41[3/] regarding causation. Defense counsel objected and asked the court to instruct with modified version of CALJIC Nos. 3.40 and 3.41. The proposed modified version of CALJIC No. 3.40 was the standard instruction plus the following paragraphs:

> A Person who has injured another is not responsible for the other's death, even though the death would not have occurred but for the injury, if the death is the result of some other independent intervening cause.
>
> In this case you must decide from the evidence whether the acts of the doctors treating Pablo Cruz constituted an independent intervening cause, so that those acts, rather than any act by the defendant were the cause of Cruz' death.

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2. CALJIC 3.40 [Cause–"But For' Test], as ultimately given, provides:

> To constitute the crime of murder there must be in addition to the death an unlawful act which was a cause of that death.
>
> The criminal law has its own particular way of defining cause. A cause of the death is an act that sets in motion a chain of events that produces as a direct, natural and probable consequence of the act, the death, and without which the death would not occur.

(CT at 92.)

3. CALJIC No. 3.41 [More Than One Cause/Concurrent Cause], as ultimately given, provides:

> There may be more than one cause of the death of Pablo Cruz. When the conduct of two or more persons contributes concurrently as a cause of the death, the conduct of each is a cause of the death if that conduct was also a substantial factor contributing to the result. A cause is concurrent if it was operative at the moment of the death and acted with another cause to produce the death.
>
> If you find that the defendant's conduct was a cause of death to another person, then it is no defense that the conduct of some other person, even the deceased person, contributed to the death.

(CT at 93.)

> Whether an intervening cause is independent, and is therefore regarded as the cause of death, depends on whether it is a normal and reasonably foreseeable result of the defendant's original act. An intervening cause need not be unlawful or a violation of a duty in order to be independent within the meaning of this instruction.
>
> If after considering all of the evidence, you have reasonable doubt as to whether an act of the defendant was the cause of Cruz' death, you must give the defendant the benefit of that doubt and find that his act was not the cause.

(Lodgment 2 at 8-9; CT at 46.)

The proposed modified version of CALJIC No. 3.41 consisted of the standard instruction plus the following two paragraphs:

> Evidence has been presented from which you may find that the defendant's act was a cause of death but that the immediate cause of the death was the unlawful (intentional) conduct of another person. You may not convict the defendant based on such a finding unless you also find that when the defendant committed the act which was a cause of the death the intervening unlawful (intentional) act of the other person would have been reasonably foreseeable to a reasonable person in the same position as the defendant.
>
> If you have a reasonable doubt whether the intervening unlawful (intentional) act would have been reasonably foreseeable to a reasonable person in the same position as the defendant you must give the defendant the benefit of that doubt and find him not guilty.

(Lodgment 2 at 9; CT at 47.)

Defense counsel also requested the court instruct the jury with a special instruction, as follows:

> An adult has a fundamental right to control decisions relating to his own health care, including the decision to have life sustaining treatment withheld or withdrawn.
>
> However, this right shall not be construed to condone, authorize, or approve mercy killing, assisted suicide, or euthanasia.

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> This right is not intended to permit any affirmative or deliberate act or omission to end life other than the withholding of withdrawing health care pursuant to an advanced directive, or by a surrogate so as to permit the natural process of dying.
>
> Euthanasia in California is neither justified nor excusable.

(Lodgment 2 at 9-11; CT at 48.)

In support of the request for the modified and special instructions, defense counsel argued that Dr. Kennedy's administration of 20 milligrams of morphine after Mr. Cruz's respirator was disconnected constituted an independent intervening act cutting off Barkacs' liability for Mr. Cruz's death. Counsel further argued that the instructions were necessary because there were no standard CALJIC instructions pertaining to such acts. (Lodgment 2 at 11.) The prosecutor objected, arguing that the law regarding causation was already addressed in the standard instructions the court proposed to give, and that the defense-proposed instructions potentially would confuse the jury. (*Id.*)

The court rejected the defense-proposed instructions. The court explained it believed that whether the decisions of Dr. Kennedy and Mr. Cruz's family were lawful or unlawful was not germane to the factual issues before the jury. The court said that regardless of whether the acts were labeled comfort care or euthanasia, "the evidence is what the evidence is," and that the jury's role in determining the cause of death would not be aided by instructing the jurors on the statutory law in California regarding euthanasia. The court further stated that, in its view CALJIC No. 8.57,[4] along with CALJIC Nos. 3.40 and 3.41, adequately addressed the issues before the jury. (Lodgment 2 at 11-13.)

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4. CALJIC No. 8.57 [Homicide–Effect Of Improper Treatment], as ultimately given the jury provided:

> Where the original injury is a cause of the death, the fact that the immediate cause of death was the medical or surgical treatment administered or that the treatment was a factor contributing to the cause of death will not relieve the person who inflicted the original injury from responsibility.
>
> Where, however, the original injury is not a cause of the death and the death was caused by medical or surgical treatment or some other cause, then the defendant is not guilty of an unlawful homicide.

(CT at 95.)

B. Analysis

Due process requires that criminal prosecutions "comport with prevailing notions of fundamental fairness" and that "criminal defendants be afforded a meaningful opportunity to present a complete defense." *California v. Trombetta,* 467 U.S. 479, 485 (1984) (*Trombetta*). When habeas relief under 28 U.S.C. § 2254 is sought, "[f]ailure to instruct on the defense theory of the case is reversible error if the theory is legally sound and evidence in the case makes it applicable." *Beardslee v. Woodford,* 358 F.3d 560, 577 (9th Cir.2004) (as amended); *see also Bradley v. Duncan,* 315 F.3d 1091, 1098 (9th Cir.2002) ("[T]he right to present a defense would be empty if it did not entail the further right to an instruction that allowed the jury to consider the defense.") (internal quotation marks omitted); *Conde v. Henry,* 198 F.3d 734, 739 (9th Cir.2000) (as amended) ("It is well established that a criminal defendant is entitled to adequate instructions on the defense theory of the case.").

Petitioner exhausted this claim by presenting it to the California Supreme Court in his petition for review. (Lodgment 3.) The California Supreme Court denied the petition without comment or citation. (Lodgment 4.) Thus, the California Supreme Court rejected Petitioner's claim in a "silent denial" on the merits. *See Hunter v. Aispuro*, 982 F.2d 344, 347-49 (9th Cir. 1992) (where the California Supreme Court issues a silent denial, such a denial is a ruling on the merits). When a state's highest court issues a silent denial, a federal habeas court may look to the last reasoned state-court decision to determine whether the state court's determination of the merits of a claim was contrary to, or involved an objectively unreasonable application of, clearly-established federal law as set forth by the United States Supreme Court. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991).

The last reasoned state court decision addressing the claim presented in ground one is the California Court of Appeal's opinion in Barkacs' direct appeal. (Lodgment 2.) There, in rejecting the claim, the court cited *People v. Roberts*, 2 Cal.4th 271, 311 (1992) (*Roberts*). (Lodgment 2 at 13-14.) In *Roberts*, the California Supreme Court rejected a claim that the defendant's right to due process was violated when the court refused to give defense-proposed instructions regarding proximate cause, and instead gave modified versions of CALJIC Nos. 8.55 and 8.57. *Roberts*, 2

Cal.4th at 312-13. In support, the Court explained that in California, liability for a homicide may be discharged if there was grossly improper medical treatment and said treatment was the sole cause of death, and therefore an unforeseeable intervening act. *Id.* This Court is bound by the California Supreme Court's interpretation regarding independent intervening acts that cut off criminal liability. *See Bains v. Cambra*, 204 F.3d 964, 972 (9th Cir. 2000) (in reviewing a habeas corpus petition that challenges a state-court's merits determination, a federal court is bound by the state court's interpretations of state law) (citing *Wainwright v. Goode,* 464 U.S. 78, 84 (1983)); *see Hartman v. Summers*, 120 F.3d 157, 161 (9th Cir. 1997) (the construction of state law is for state courts; they alone are the expositors of state law); *see Hicks v. Feiock*, 485 U.S. 624, 629 (1988) (a federal court is bound by the state courts' interpretations of state law).

Here, echoing *Roberts*, the Court of Appeal noted that California law requires that gross medical negligence be the sole cause of death in order to constitute an independent intervening act. But, the Court explained, there was no evidence in Barkacs' case that gross medical negligence was the sole cause of Mr. Cruz's death. In fact, the Court observed, even the defense expert testified that, although in his opinion morphine toxicity caused an acute respiratory depression that resulted in death, it was ultimately due to blunt force trauma, i.e., the injury inflicted by Barkacs when he propelled Mr. Cruz off the car, that set the events in motion. Thus, under California law, the defense-proposed instructions were not based on a legally sound theory, and therefore were not required.

In other words, nothing about the California Court of Appeal's rejection of Barkacs' claim was contrary to, or involved an unreasonable application of, *Trombetta*. Accordingly, ground one should be denied.

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V.

GROUND TWO SHOULD BE DENIED BECAUSE THE STATE COURT'S MERITS DETERMINATION WAS CONSISTENT WITH CONTROLLING PRECEDENT AND REASONABLE

In ground two, Barkacs claims he was denied his Fifth Amendment right to a "chosen jury,"[5] his Fourteenth Amendment right to due process, and his Sixth Amendment right to a fair trial, when the trial court denied his request to excuse a juror and replace her with an alternate juror. (Petition at 7.)

A. Background

During voir dire, juror number 5, a local banker, informed the court that sometime in the preceding six months she had sat across the table from the prosecutor at a community function, i.e., a chamber of commerce event. She further stated that she knew the prosecutor's wife for three to five years, and had often seen her at community events. Nevertheless, juror number 5 said, she had not done anything "casually" with the spouse. (Lodgment 5 (Reporter's Transcript from Petitioner's direct appeal in state court) (RT), at 21.) In response to a question form the court, juror number 5 said she did not think there was any possibility that she would favor the prosecution. In response to questions from defense counsel, juror number 5 acknowledged that she knew several attorneys and judges as a result of her community involvement. (RT at 21-23.) Later during voir dire, the court asked the prospective jurors if any of them had close friends or relatives who were police officers, prosecutors, or defense attorneys. Juror number 5 did not so indicate. (RT at 52-53.)

Three days into trial, the prosecutor informed the court that another prosecutor had informed him he was in the same Rotary Club as juror number 5. (RT at 403.) Outside the presence of the rest of the jury, the court asked juror number 5 a series of questions concerning her relationship with the other prosecutor. Juror number 5 acknowledged she was in the same Rotary Club as the other prosecutor. When the court asked her why she had not disclosed that when earlier asked if she knew anyone in law enforcement or who worked for a prosecutor's office, juror number

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5. It is not clear what Constitutional right Barkacs is claiming was violated when he refers to his right to a "chosen jury". Presumably, he means his right to an unbiased jury.

5 said she understood the question to pertain to someone she socialized with or really knew. Juror number 5 elaborated that although she had been in the same Rotary Club with the other prosecutor for approximately a year, she did not socialize with him, or really know him personally. Juror number 5 continued, that the former Chief of the El Cajon police was also in the club, but she considered him a co-member rather than a friend. In response to questions from defense counsel, juror number 5 said it was part of her job to be out in the community, and as a result she ran across a number of people, including a judge who was a former member of the Rotary Club, and a police officer who had occasionally attended Club meetings. In response to a question from the prosecutor, juror number 5 said there was noting about her relationships with the referenced individuals that would prevent her form being fair and impartial in judging the evidence at trial. (RT at 405-08.)

After juror number 5 left the courtroom, defense counsel asked the court to dismiss the juror and replace her with an alternate. (RT at 409-10.) The court denied the request, finding the juror had answered all of the voir dire questions "appropriately, honestly, and completely." The court noted that there is a difference between having a close friend or relative in law enforcement versus someone who might be a member of the same community group or club. The court ruled there was no evidence of the slightest bias or prejudice on juror number 5's part, and therefore no reason to excuse her for cause. (RT at 410-11.)

B. Analysis

The Sixth Amendment guarantees a defendant a right to a fair trial, which includes an impartial jury capable and willing to decide the case solely on the evidence before it. *Fields v. Brown*, 503 F.3d 755, 766 (9th Cir. 2007) (citing *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984) (*McDonough*)). Voir dire protects that right, by exposing possible biases by the jurors. *Fields v. Brown*, 503 F.3d at 766 (citing *McDonough*, 464 U.S. at 554). When a juror appears to have given a mistaken but honest response to a question on voir dire, in order to obtain a new trial a party must demonstrate that the juror failed to honestly answer a material question, and that a correct response would have established a valid basis for a challenge for cause. *McDonough*, 464 U.S. at 556. The determination of whether a juror was dishonest is a question of fact. *Dyer v. Calderon,* 151 F.3d 970, 973 (9th Cir.1998) (en banc)

The last reasoned state court decision addressing the merits of Barkacs' claim is the California Court of Appeal's opinion in Barkacs' direct appeal. There, in discussing the general principles of law concerning the right to an impartial jury, the court cited *People v. Nessler*, 16 Cal.4th 561, 578 (1997). *Nessler*, in turn, relied on the Sixth and Fourteenth Amendments to the federal Constitution, as well as *Irvin v. Dowd*, 366 U.S. 717, 722 (1961), which held the right to a jury trial guarantees a defendant a fair trial by a panel of impartial jurors. Accordingly, the state court applied the correct controlling federal law.

As to the application prong of an AEDPA analysis, the court found juror number 5 did not withhold information during voir dire. The court explained that the question on voir dire had been whether any of the prospective jurors had any close friends or relatives who were police officers or prosecutors. Therefore, the court found, juror number 5 did not have an obligation to disclose the fact that police officers, a trial judge, and some prosecutors were members of, and participated in, a rotary club to which juror number 5 also belonged. The state court's finding constitutes a finding of fact, *Dyer v. Calderon,* 151 F.3d at 973, which this Court must defer to unless Barkacs establishes, by clear and convincing evidence, that the state court's determination was unreasonable. 28 U.S.C. § 2254(d)(2). As Barkacs has presented nothing in support of his claim, and instead relies solely on the trial record, he has not established that the state court determination was unreasonable. Therefore, the answer to the threshold question, of whether juror number 5 withheld information during voir dire, is no.

Similarly, as the state court explained, nothing in the record indicates juror number 5 had a close personal relationship with any of the relevant individuals, including the prosecutor who tried the case and his wife. Given the absence of any suggestion of potential, let alone real, bias on juror number 5's part, i.e., a basis for a challenge for cause, it cannot reasonably be said that the California Court of Appeal's determination was contrary to, or involved an unreasonable application of, *McDonough*. Accordingly, ground two should be denied.

VI.

PETITIONER IS NOT ENTITLED TO HABEAS RELIEF ON GROUND THREE, BECAUSE THE STATE COURT'S MERITS DETERMINATION WAS CONSISTENT WITH CONTROLLING PRECEDENT AND REASONABLE

In ground three, Barkacs claims the trial court violated his right to due process when it allowed the prosecution to question a witness about his fear of retaliation from Barkacs' family. (Petition at 8.)

A. Background

On direct-examination, Pete said he did not remember having a discussion with Barkacs or Barkacs' father, William, at Williams' motel room after the incident. (RT at 301-02.) He also said that he could not recall telling the detective who interviewed him, that after he and Barkacs left the motel room he saw Barkacs putting gasoline in a Gatorade-style bottle. (RT at 304.) After a recess, and after noting Pete was late returning to court after the lunch recess, the prosecutor informed the court that he and a detective had spoken with Pete during the recess, regarding Pete not testifying truthfully when he said he could not remember many things. The prosecutor said that although Pete had hesitated and balked, he ultimately told the prosecutor and the detective that he would be honest in court. The prosecutor then noted he was concerned that Pete might have fled or would not return to court, and asked permission to treat him as a hostile witness should he return. (RT at 317-18.) Shortly thereafter, Pete returned to court and defense counsel resumed cross-examination. (RT at 320.)

Subsequently, on redirect-examination, the prosecutor asked Pete if Pete had answered the prosecutor's questions honestly during the morning session. Pete said, "Not exactly." The prosecutor asked, "Why not?" Pete replied, "I don't know." The prosecutor asked Pete if one of the reasons was that Pete felt sorry for Barkacs. (RT at 328-29.) Barkacs answered, "Something like that." The prosecutor asked Pete if Pete thought Barkacs did not intend to kill Mr. Cruz, and Pete said, "Yes, that's correct." (RT at 329.)

A few moments later, the prosecutor asked Pete if he had not been completely honest for another reason, i.e., because Pete was somewhat concerned about retaliation from members of

Barkacs' family. Defense counsel objected to the question, and the court overruled the objection. Pete then said, "That wasn't exactly the main concentration of it, but that just has everything to do with even being here in the first place, you know what I'm saying? But. . ." (RT at 329.) Pete continued, "That wasn't exactly the reason. I just didn't say anything probably because it sounds bad that I took him to get gas. (RT at 330.)

B. Analysis

It is well-settled that the admissibility of evidence is generally a matter of state law and will rarely support federal habeas corpus relief. *Estelle v. McGuire,* 502 U.S. 62, 67-68 (1991). When a claim regarding the admissibility of evidence is presented in a federal habeas corpus petition, the habeas court's review is limited to determining whether the petitioner's constitutional rights have been violated. *Rainer v. Department of Corrections,* 914 F.2d 1067, 1072 (8th Cir.1990) (*Rainer*), *cert. denied,* 489 U.S. 1099 (1991). On habeas review of state evidentiary rulings, the court determines whether the admission of evidence rendered the proceeding so fundamentally unfair that it violated due process. *Larson v. Palmateer*, 515 F.3d 1057, 1066 (9th Cir. 2008) (citing *Windham v. Merkle*, 163 F.3d 1092, 1103 (9th Cir. 1998)); *see Rainer*, 914 F.2d at 1072 (the issue is not whether the trial court erred in admitting the evidence, but whether the admission resulted in a trial so fundamentally unfair as to deny the petitioner due process of law). A habeas court must look at the totality of the facts in the case and analyze the fairness of the trial. *Id.* at 1072. To justify a grant of relief, the error must be "so gross, conspicuously prejudicial, or otherwise of such magnitude that it fatally infected the trial and failed to afford [petitioner] the fundamental fairness which is the essence of due process." *Id.,* at 1072 (quoting *Mercer v. Armontrout,* 844 F.2d 582, 587 (8th Cir.), *cert. denied,* 488 U.S. 900 (1988) (internal quotation marks omitted). A federal court is "not a State Supreme Court of errors" and does not interfere with a state evidentiary ruling unless the ruling regarding such evidence was so prejudicial that its admission or exclusion violation fundamental due process and the right to a fair trial. *Jammal v. Van de Kamp,* 926 F.2d 918 (9th Cir. 1991); see also *Jeffries v. Blodgett,* 5 F.3d 1180, 1192 (9th Cir. 1993). The purpose of habeas review is not to independently weigh the evidence, assess credibility, resolve evidentiary conflicts, or decide if the reviewing court would have reached the same result. *Jackson v. Virginia,* 443 U.S. 307, 324 (1979).

The last reasoned state court determination addressing the merits of Barkacs' claim is the California Court of Appeal's opinion in Barkacs' direct appeal. There, the court assumed, for the sake of discussion, that the trial court erred when it overruled Barkacs' objection because the prosecution did not establish a good-faith basis for asking it. Consequently, the reviewing court did not discuss any federal or state law concerning the improper admission of evidence. Instead, it proceeded directly to a prejudice analysis and found the error harmless under any standard of prejudice. (Lodgement 2 at 25-26.)

The state court was correct. As the court reasoned, the contested evidence consisted of a single question. Moreover, Pete denied fearing retaliation from Barkacs' family. Further, the jury was instructed that the statements of the attorneys were not evidence and that they were not to assume that anything insinuated in a question was true. Finally, the court noted that the facts surrounding Mr. Cruz's death were undisputed, Pete testified consistently with those facts, and that the circumstantial evidence supporting the arson charge, even excluding Pete's testimony, was strong. (Lodgment 2 at 26.)

Given the de minimis nature of a single question, the witness's denial of what was insinuated in the question, the fact that there was no dispute regarding the acts that led to Mr. Cruz's death, the fact that Pete testified consistently with those facts, and the strength of the evidence supporting the arson conviction, it cannot reasonably be said that the prosecutor's question constituted a gross, conspicuously prejudicial statement fatally infecting the trial such that Barkacs was deprived of the fundamental fairness which is the essence of due process. To the contrary, it was a minor error by the prosecutor, which probably resulted from information he had concerning some fear of retaliation. Nevertheless, he mistakenly forgot to establish a foundation for the question, and his failure was then exacerbated by defense counsel's failure to object on foundation grounds. Finally, it can reasonably be presumed that, even if the prosecutor had realized that he had not established a foundation for the question, he opted not to go ahead and do so in light of Pete's denial. Therefore, nothing about the California Court of Appeal's rejection of the claim was contrary to, or involved an unreasonable application of, controlling federal law. Accordingly, ground three should be denied.

CONCLUSION

For the foregoing reasons, the Petition should be denied, the proceedings should be dismissed with prejudice, the Court should not order an evidentiary hearing, and the Court should not issue a certificate of appealability.

Dated: May 6, 2008

Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **James Robert Barkacs v. D. Adams, Warden**

No.: **07cv2139 JAH (WMc)**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266.

On May 7, 2008, I served the attached **ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Diego, California, addressed as follows:

James Robert Barkacs
V-75306
P.O. Box 3476
Corcoran, CA 93212

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 7, 2008, at San Diego, California.

D. Perez	[signature]
Declarant	Signature

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